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In the Matter Of:
CINCINNATI INS CO vs. BANKS

4:12-cv-32

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1 Q. Do you have your time sheets in that file?

2 A. I only have the time that I have put into
3 the review of the case and preparation of the report.

4 Q. Okay. What other time would there be?

5 A. I don't know of any. I don't keep a
6 separate time sheet. When I initially did this case,
7 it was as I do a case review, and the case review
8 comes with whatever counsel would need as far as a
9 verbal or written report. And I just charge a flat
10 rate of \$500 for that.

11 Q. Okay. All right. Well, let me -- let me
12 see if I can narrow down some questions, then. Have
13 you been to the property that burned in Manchester?

14 A. I have not.

15 Q. Other than reviewing records, have you
16 performed any independent testing that you believe
17 relates in any way directly to this case?

18 A. No, sir.

19 Q. Have you spoken with any witnesses on your
20 own that relate in any way to this case?

21 A. No, sir.

22 Q. Does this notebook contain all the
23 documentation that you have reviewed?

24 A. Yes.

25 Q. In your report, you itemized a listing of



1 documents beginning at page 3 of 22 that you had
2 reviewed.

3 A. Yes.

4 Q. Other than those documents, and perhaps
5 since the preparation of this report, have you
6 reviewed anything else?

7 A. The only thing further that I have
8 reviewed is an affidavit prepared by John Lentini,
9 L-e-n-t-i-n-i, and a deposition taken of Mr. Sells on
10 January 8th of this year.

11 Q. Have you made any supplemental reports
12 based upon your review of those additional items?

13 A. I have not.

14 Q. Have any of the opinions that you gave in
15 your report that we have marked as Exhibit 3 changed
16 in light of your review of Mr. Lentini's report or
17 Mr. Sells deposition?

18 A. I don't believe so.

19 Q. All right. Have you developed any new
20 opinions based upon either the review of
21 Mr. Lentini's report or Mr. Sells deposition?

22 A. I don't believe so.

23 Q. All right. So basically Exhibit 3 is what
24 we've got?

25 A. Yes, sir.



1 Q. All right. Let's talk about John Lentini
2 for a minute. You and he used to be in business
3 together; is that correct?

4 A. We were employed by the same company, yes.

5 Q. That was Applied?

6 A. Applied Technical Services in Marietta,
7 Georgia.

8 Q. When did you leave Applied?

9 A. February 22nd, 2010.

10 Q. When did Mr. Lentini leave Applied?

11 A. September 30, 2006.

12 Q. Do you know why Mr. Lentini left?

13 A. He was ready to depart the everyday
14 working for somebody else. He had purchased his
15 retirement home in the Florida Keys. His children
16 were all out of the house, grown and gone, and it was
17 time for he and his wife to enjoy the rest of their
18 time down in Florida with him still doing consulting
19 work. But he wasn't involved in the day-to-day
20 operation of the fire investigation department nor
21 was he going out on a regular basis to do fire scene
22 examinations.

23 Q. At the time he left, was he still
24 performing the gas chromatography testing for
25 Applied?



1 in this case, we can say that the fire vented out of
2 certain openings prior to the damper being open or
3 failure of the ceiling.

4 Q. All right. You mentioned the -- I think
5 in that answer that you would attempt to determine
6 the level of fire origin, too. In your opinion, did
7 this fire originate on the main level of the
8 structure?

9 A. It did.

10 Q. Okay.

11 A. There was no evidence of any venting from
12 any of the basement. And I understand that the newer
13 section that we're referring to at the left end or
14 west end of the house was a three-story structure.
15 The lowest level was basement or below the main level
16 of the original house. So when the addition was
17 built, the actual second level of the addition is
18 equivalent to the main level of the house.

19 Q. All right. Do you have an opinion as to
20 the source of ignition within your area of origin?

21 A. No, sir.

22 Q. In discussing the level of destruction at
23 some point in your report, specifically on page 6 of
24 22, you comment upon the fact that the master bedroom
25 floor had been mostly consumed and had collapsed into



1 A. Certainly not. I probably would have done
2 much the same thing.

3 Q. Did you read in his deposition the manner
4 in which he layered through the debris?

5 A. I did.

6 Q. And what was that?

7 A. His terminology of hand sifting is
8 certainly incorrect. The term sifting means you've
9 sifted. And sifting requires the use of a screen so
10 that you can see the minutia of items that may be in
11 the debris. All he did was hand shoveled and
12 hand raked through the debris, which is a common
13 technique that fire investigators use. And this is
14 often used when you're looking for larger items such
15 as a television set or a clock radio or dryer. If
16 you're looking for something larger or looking for
17 electrical wiring, these type of things, that's
18 perfectly acceptable system to use for going through
19 the debris.

20 If you're looking for anything smaller
21 than what you can rake or shovel, for instance, you
22 will never find or rarely find a single lithium ion
23 battery with a rake and a shovel. You will almost
24 always need to use a screen. So if we're looking for
25 something the size of a double A battery, then hand



1 shoveling and raking are not an appropriate
2 methodology for going through that debris.

3 Q. And have you performed any sifting of
4 debris?

5 A. Have I?

6 Q. Yes.

7 A. On this case?

8 Q. Yes.

9 A. Oh, certainly not.

10 Q. Are you aware of anyone who has actually
11 sifted the debris?

12 A. I am not.

13 Q. As you have used the term?

14 A. That is correct.

15 Q. Other than Mr. Sells, are you aware of any
16 person who has actually dug through the debris?

17 A. The only people I know of is what
18 Mr. Sells reported is that there were some debris
19 removal actions done by the fire department, and I
20 believe that's Mr. Woods with the fire department,
21 prior to Mr. Sells arrival.

22 Q. Do you have an opinion as to the cause of
23 this fire?

24 A. No, sir. Other than undetermined.

25 Q. Have you reviewed the opinions either in



1 fire reports or deposition of Jeremy Woods?

2 A. No.

3 Q. What about Russel Robinson with the State?

4 A. No.

5 Q. Do you know the opinion as to the cause of
6 the fire that Mr. Woods arrived at?

7 A. No, sir.

8 Q. Do you know the opinion that Mr. Robinson
9 arrived at?

10 A. No.

11 Q. I think I know the answer to the question,
12 but I've got to ask it for the record anyway.

13 Therefore, do you have any criticism of the
14 methodology that they used in arriving at their
15 conclusions?

16 A. Without knowing what their conclusions
17 are, I certainly wouldn't be able to opine about
18 their methodology.

19 Q. Do you know what the sources of ignition
20 were in the area that you have labeled as the likely
21 origin area on Exhibit 4?

22 A. It would be whatever is part and parcel of
23 the structure and the contents. So in the case of an
24 electrical fire, it would be anything of the
25 electrical system that would have been energized



1 prior to this fire. Any of the house wiring, any of
2 the appliances plugged into any of the house wiring.
3 Those are the common articles that one would look at
4 to opine as to whether they may or may not have been
5 involved in the ignition of this fire.

6 Q. Have you looked at those articles to see
7 if they were involved in the ignition of this fire?

8 A. I have not. I have only reviewed the
9 documents that were provided.

10 Q. I looked through your updated list of
11 testimony this morning and I do not think I saw any
12 cases where you have testified as a witness either
13 for or against Cincinnati; is that accurate?

14 A. I don't think so. I don't think any of
15 the Cincinnati cases I ever worked went to deposition
16 or trial. They may have.

17 Q. And you obviously have worked for
18 Cincinnati before?

19 A. That is correct.

20 Q. And have you ever worked for Cincinnati in
21 the state of Tennessee?

22 A. I have.

23 Q. Based upon your -- well, let me ask you
24 this. I know you've reviewed a fairly limited amount
25 of materials, but based upon what you reviewed, do



1 A. No, sir, I do not know her.

2 Q. Do you have an opinion whether there were
3 any ignitable liquids present in any of the debris
4 samples taken by Mark Sells?

5 A. I do.

6 Q. And what is that opinion?

7 A. That none of the samples had any ignitable
8 liquid residues in them.

9 Q. And what is that opinion based on?

10 A. It's based initially on Ms. Foran,
11 F-o-r-a-n, Ms. Foran's report where there were
12 multiple samples taken. She identified two of nine
13 as being negative. I'm sorry, two of nine being
14 positive, the other seven being negative. When
15 that -- when those two positives were reviewed, it
16 was found that those are not in fact positive
17 samples.

18 Q. And you're talking about Mr. Lentini's
19 review?

20 A. That is correct.

21 Q. Did you perform any analysis of the
22 gas chromatography and mass spectrometry testing on
23 your own?

24 A. I did not. I'm not a fire debris analyst.
25 I'm familiar with the methodology from working in the



1 fire debris laboratory at Applied Technical Services.

2 Q. But as to the methodology, would you defer
3 to Mr. Lentini on that?

4 A. Absolutely.

5 Q. In your report, page 4, the top sentence,
6 you indicate: This author utilized the guidance set
7 forth in NFPA 921, The Guide For Fire and Explosion
8 Investigations, 2011 edition, for the analysis of
9 this fire. Is that correct?

10 A. That is correct.

11 Q. Is it your view that NFPA 921 is a guide?

12 A. Absolutely it's a guide.

13 Q. And do you know what the word standard is?

14 A. Yes, sir, I do.

15 Q. NFPA publishes standards also, don't they?

16 A. Standards, recommended practices and
17 guides.

18 Q. All right. So tell me in your opinion
19 what the role of NFPA 921 in directing or with
20 respect to a fire investigation really is.

21 A. NFPA 921 is the only peer reviewed
22 consensus document that exists in the world in the
23 field of fire investigation. It's been accepted by
24 the courts as a standard of care, and that's where
25 the word standard comes in very often. The title on



1 the book certainly is a guide, and it says right in
2 there that you do not have to abide by anything that
3 this document says, however, my experience has been
4 that if you deviate from the guidance set forth in
5 NFPA 921, you will have to explain that. And
6 certainly, it's a very large document now. Not every
7 chapter is relevant to every fire scene so,
8 therefore, you do not need to utilize every paragraph
9 of the entire document.

10 Q. Your resume indicated that you were a
11 member of the NFPA 921 committee; is that correct?

12 A. That is correct and I still am.

13 Q. With respect to the 2011 edition, were you
14 a full member or were you -- what's the word?

15 A. Alternate.

16 Q. Alternate for Mr. Lentini?

17 A. I have always been Mr. Lentini's
18 alternate.

19 Q. And what does it mean to be an alternate?

20 A. I provide the same services that he would
21 provide if he is not there as far as voting. That's
22 the only place where an alternate is silent is if the
23 sitting committee member is there present at a
24 meeting and a vote is taken, the alternate doesn't
25 get a vote. As far as the conversations, as far as



1 Q. All right. 3, collect data. Do you agree
2 that he did collect data?

3 A. He did collect data.

4 Q. And let me ask you something about some of
5 the data he collected. Is the result of the
6 gas chromatography and mass spec testing some of the
7 data that he collected?

8 A. It would be data that was generated based
9 upon material items he collected. It becomes data.

10 Q. Okay. As a fire investigator in Mr. Sells
11 position, do you see any reason that he should not
12 have considered the report from Christine Foran in
13 assessing the overall data and arriving at his
14 conclusions as to the fire?

15 A. I have no problem with him accepting the
16 fact that his chemist says that he took two positive
17 samples out of the Banks' residence. What I take
18 exception with, of course, is him making the leap
19 that where he got these reported positive samples
20 means that there were or was the presence of
21 ignitable liquids in other areas of the house.

22 Q. I understand. And we're going to get to
23 that. But just the mere fact that he took her word
24 for it, based upon what appeared to be her testing
25 that those were positive, that's not a criticism that



1 you have?

2 A. No.

3 Q. Okay. Number 4, analyze the data. Here
4 you have an italicized version or a partial paragraph
5 so I presume you have some criticism of Mr. Sells
6 analysis of the data?

7 A. That is correct.

8 Q. Tell me what your criticism is as to his
9 analysis of the data.

10 A. All fire investigators analyze the data in
11 light of their own training, education, knowledge and
12 experience. Each fire investigator will look at the
13 data collected from a fire scene perhaps differently.
14 Mr. Sells identified an area of origin as the area of
15 the master bedroom on the main level of the addition.
16 From there, he collected some samples. The samples
17 that he collected from his opined area of origin were
18 negative for the presence of ignitable liquids. He
19 goes to another area of the house, which he does not
20 include as part of his area of origin. He sees what
21 he opines as being holes in the floor that could only
22 be done by the presence of ignitable liquids. Even
23 though there are no walls in this area and there's no
24 roof, there's no ceiling, none of this part of the
25 structure exists. So he's only looking down at holes



1 in the floor and says, these must be due to an
2 ignitable liquid. And when he gets his report back
3 from the chemist, it says, yes, there's ignitable
4 liquid residues there, he has an aha. And so in his
5 opinion, because he either lacks training, education,
6 knowledge or experience, or a combination thereof, he
7 can't see any other way that these holes could appear
8 in the floor without the use of an ignitable liquid,
9 which means to me that he's never investigated a fire
10 of a structure that was a lightning strike into a
11 roof and by the time the fire department gets there
12 and puts it out, all that's remaining is a basement.
13 So obviously, even a lightning strike to a roof where
14 the origin of the fire is up very high can result in
15 the total destruction of a house. So obviously, at
16 some point in time that fire will burn down. May be
17 due to radiant heat, it may be due to a flashover
18 situation occurring, whatever it is, you can get fire
19 damage on floors without there being an ignitable
20 liquid there.

21 Q. How are you using the term flashover?

22 A. Flashover is a phenomenon that occurs when
23 the heat flux in a room becomes intense enough to
24 basically ignite all of the combustibles in that
25 room.



1 see any evidence of an electrical ignition to the
2 fire?

3 A. No, sir, but I did not inspect or examine
4 any of the electrical components. There's a one-page
5 document from the electrical engineer that Mr. Sells
6 had at the fire scene who said that the damage was
7 too extensive for him to identify anything as
8 potential cause or eliminate any of it as potential
9 cause for the fire.

10 Q. Do you believe that Mr. Sells made an
11 attempt to properly analyze the data?

12 A. I believe he made an attempt to. Again,
13 in light of his training, education, knowledge and
14 experience. He did in fact employ the services of an
15 electrical engineer within his company to assist him
16 in understanding the potential electrical failures or
17 faults within his area of origin.

18 Q. You've mentioned lightning strike and I
19 think I've asked you this, but is it your opinion
20 that a lightning strike caused this fire?

21 A. No, sir, I have no data to support a
22 lightning strike.

23 Q. All right. Point number 5 on page 22
24 deals with developing a hypothesis. And then point
25 number 6 is testing the hypothesis, and then it



1 ignitable liquid. However, a linoleum floor, you
2 will -- in my experience, never gotten a positive
3 sample off a linoleum floor. And we have actually
4 done some laboratory tests where we have taken fresh
5 linoleum right off the rack at Home Depot, taken a
6 sample of it, run it through the GC to get a
7 baseline, poured gasoline on it, kerosene, diesel
8 fuel, burned it, put it in the can, and nothing comes
9 back. It comes back with the same -- so the matrix
10 of whatever that linoleum is simply doesn't retain
11 any of the ignitable liquids. However, hardwood
12 floorings and carpet, things like that do.

13 Q. What is a saddle burn?

14 A. Saddle burn is the appearance of a burn
15 that goes from the surface of the floor down, usually
16 in a curved manner such as what a horse saddle would
17 look like.

18 Q. Do you believe that the photographs that
19 Mr. Sells took of the office area depicts saddle
20 burning?

21 A. I believe they do, yes.

22 Q. And I think you told me it's your opinion
23 that was from drop down?

24 A. From fall-down, yes, sir.

25 Q. Fall-down.



1 possibly have been anything other than a human act to
2 have caused that fire.

3 Q. Do you agree that the NFPA 921 permits the
4 use of witness information to determine the cause of
5 a fire when the ignition source is undetermined?

6 A. It is data that can be utilized, but
7 typically witnesses are not generally used for the
8 cause of the fire.

9 Q. Does the NFPA permit the use of just
10 general principles of fire dynamics in determining
11 the cause and origin of the fire when the ignition
12 source cannot be identified?

13 A. Absolutely. That's part of the data
14 collection and data analysis is fire dynamics.

15 Q. If you would, turn to page 6 of -- you may
16 already be there. The second opinion that you have
17 is that the fire cause could not be shown to be
18 intentionally set as opined by Investigator Sells;
19 correct?

20 A. That is correct.

21 Q. And I think we've talked about that. It's
22 your opinion that the cause of the fire should have
23 been listed as undetermined?

24 A. Absolutely correct.

25 Q. All right. And have you told me in



1 discussing the two criticisms of Mr. Sells' analysis
2 and his testing of the hypothesis, basically the
3 reasons why you think that the fire should have been
4 determined to be undetermined?

5 A. I believe so.

6 Q. All right. Under that, you have some
7 other highlighted areas and I want to ask you about
8 those. The first one says potential heat/ignition
9 sources identified within the area of origin include
10 introduction of open flame.

11 What is your point regarding that?

12 A. That's Mr. Sells wording that the
13 potential heat/ignition sources within the area of
14 origin include introduction of an open flame. Well,
15 of course, they do. That is something that is
16 possible in any fire. However, he didn't list that
17 the unidentified electrical devices or electrical
18 wiring are also, you know, included in his area of
19 origin as potential heat ignition sources. In other
20 words, the only thing he identified as a potential
21 for this fire is an open flame.

22 Q. If an ignitable liquid is used in a fire,
23 do you agree there has to be an open flame to ignite
24 the vapors from the ignitable liquid?

25 A. Not necessarily an open flame, but an arc,



1 Q. In your opinion, did the room identified
2 as the office experience flashover?

3 A. Absolutely.

4 Q. In order for the office to flashover, the
5 roof had to remain intact at least at that point in
6 the fire; correct?

7 A. That is correct.

8 Q. Turn over to the next page, page 8 of 22.
9 And I think this is opinion number 3, and we've
10 talked about this some. The fire should be
11 classified as undetermined; is that correct?

12 A. Correct.

13 Q. I'll come back to that.

14 In the bottom of that, the bottom of that
15 page, you make a comment that it is possible that the
16 actual cause of the fire could have been found in the
17 debris of the master bedroom area had a different
18 method of debris removal been used. Do you see that?

19 A. Yes, sir.

20 Q. What other method of debris removal do you
21 believe should have been used?

22 A. It certainly could have been cleared by
23 hand and sifted. It's not an operation that's
24 unfamiliar to most fire investigators. It's long and
25 tedious and requires a lot of manual labor, but you



1 will find the minutia of everything that's in that
2 fire scene.

3 Q. And I take it from your prior answers that
4 you do not know if the sifting of that debris would
5 have shown anything about the cause of the fire, you
6 just think it could have been done better?

7 A. Absolutely.

8 Q. Do you have a Tennessee private
9 investigator's license?

10 A. Not currently.

11 Q. Did you have -- or when did you have one?

12 A. 2011 or '12 was the last time that I had a
13 valid Tennessee license. It expired and I'm in the
14 process of reapplying.

15 Q. At the time you performed your analysis of
16 the Banks case, were you current in your Tennessee
17 licensure?

18 A. I don't know.

19 Q. Okay. You may need to look at your
20 records, I don't know. When were you actually
21 retained in this case?

22 A. November 28th, 2012.

23 Q. All right.

24 A. That comes from page 3 of my report.

25 Q. All right. Have you and Mr. Lentini had



1 time of the Banks fire?

2 A. No, sir.

3 Q. I know at some point in the past you have
4 done a lot of work on vehicle fires. What is your
5 current breakdown of automobile fires versus house
6 fires?

7 A. Probably 50/50.

8 Q. And has it been that way for some period
9 of time?

10 A. Typically. One month I may look at 10
11 cars and 3 houses and the next month I look at 15
12 houses and 2 cars.

13 Q. Right. Does gas burn at a higher
14 temperature than wood?

15 A. No. And I assume -- I'm sorry. I assume
16 that you meant gasoline?

17 Q. Yes.

18 A. And not a natural gas or a propane gas.

19 Q. Right. And I don't mean ignition
20 temperature, either, I mean flame temperature?

21 A. Actual open flame temperature of almost
22 any product is in the 14 to 1,600 degree Fahrenheit
23 range.

24 Q. Let me show you section 18.4.4.3 from the
25 2011 edition of NFPA 921, and I want to talk through



1 that section with you. Are you familiar with that
2 section?

3 A. Absolutely.

4 Q. All right. Let's go through it. It says:
5 There are times when there is no physical evidence of
6 the ignition source found at the origin, but where an
7 ignition sequence can logically be inferred using
8 other data. Do you agree with that?

9 A. Yes.

10 Q. And I take it that from what we've talked
11 about, your opinion is that Mr. Sells' conclusions
12 don't represent a logical inference based upon the
13 evidence that he observed?

14 A. That is correct.

15 Q. All right.

16 A. Or the data that he collected.

17 Q. Correct. On in that primary paragraph, it
18 says: The following are examples of situations that
19 lend themselves to formulating an ignition scenario
20 when the ignition source is not found during the
21 examination of the fire scene. The list is not
22 exclusive and the fire investigator is cautioned not
23 to hypothesize an ignition sequence without data that
24 logically supports the hypothesis.

25 Did I read that correctly?



1 A. Yes, sir.

2 Q. All right. And in going through
3 specifically identified factors A through E, let's
4 look at a couple of those. B is: When an ignitable
5 liquid residue, confirmed by laboratory analysis, is
6 found at one or more locations within the fire scene
7 and its presence at that location does not have an
8 innocent explanation.

9 Did I read that correctly?

10 A. You did.

11 Q. All right. If the GC and mass spec
12 testing that was done by Christine Foran did actually
13 confirm ignitable liquid residue, according to this
14 paragraph of the NFPA guidelines, it did not have to
15 be in the area of origin, did it, to be a factor that
16 is proper for Mark Sells to consider in reaching his
17 conclusion?

18 A. That is correct, when you read that one
19 paragraph. But it also says see incendiary fire
20 chapter.

21 Q. Correct.

22 A. Which will run you through an entire list
23 of incendiary fire characteristics.

24 Q. Subheading C there also references
25 incendiary fires chapter, but it talks about there

